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No. 84-147

In The

# Supreme Court of the United States

October Term, 1983

MILLER, et al.,

*Appellants,*

vs.

CALIFORNIA COMMISSION ON THE STATUS OF WOMEN,

*Appellee.*

**On Appeal From the Court of Appeal of California Third Appellate District**

## MOTION TO DISMISS OR AFFIRM

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No. 84-147

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October Term, 1983

MILLER, et al.,

*Appellants,*

vs.

CALIFORNIA COMMISSION ON THE STATUS OF WOMEN,

*Appellee.*

**On Appeal From the Court of Appeal of California Third Appellate District**

## MOTION TO DISMISS OR AFFIRM

Appellee California Commission on the Status of Women, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to dismiss the appeal now pending herein on the following grounds:

1. This appeal is not within this Court's jurisdiction; and
2. This appeal does not present a substantial federal question.

In the alternative, appellee moves to affirm the opinion of the Court of Appeal of California, Third Appellate

District, on the ground that the questions presented in the appeal are so insubstantial as not to require further argument.

—o—

## PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Appellants are taxpayers "disgruntled with the views and activities of the California Commission on the Status of Women." *Miller v. California Commission on the Status of Women,* 151 Cal.App.3d 693, 695 [198 Cal.Rptr. 877] (1984). They filed a taxpayer action, as permitted in California courts, seeking declaratory and injunctive relief to abolish the Commission or restrict its activities in support of equality on the basis of gender. *Miller,* at 695-696.

Appellants claimed that the Commission's activities exceeded its statutory authority under California Government Code section 8240 *et seq.,* or, alternatively, that the statutory authority for such activities violated the constitutional guarantees of freedom of speech and equal protection. *Miller,* at 696-697. The California Court of Appeal ruled against appellants on every issue, and the California Supreme Court denied hearing. Appellants' Appendix B, A-3. The state appellate court's determinations as to the Commission's authority under state law and the validity of the state law under the California Constitution are, of course, not subject to review herein. *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 579, n.9 (1981); *Coleman v. Alabama,* 399 U.S. 1, 9 (1970).

Appellants seek to raise two issues of federal constitutional law on appeal. They contend the Commis-

sion's statutory authority violates a right, under the First Amendment to the United States Constitution, "first, to know the truth unsullied by government propaganda and second, to be free from being forced to join or support positions or views" (Jurisdictional Statement, page 1). They also contend that the existence of the Commission violates the equal protection guarantee of the Fourteenth Amendment to the United States Constitution (Jurisdictional Statement, page 2). The Commission agrees that these two issues were raised and decided adversely to appellants by the California Court of Appeal. Nevertheless, the Commission respectfully submits that the appeal is improper and should be summarily dismissed.

The first basis for dismissal is lack of jurisdiction in this Court. Appellants have pursued a taxpayer's action which, though permitted in California courts, does not give appellants standing to proceed in federal courts. Appellants have alleged no standing except as taxpayers, and have presented no injury other than the injury to the general public allegedly caused by an unconstitutional state statute. As this Court ruled so recently:

> "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal Court." *Allen v. Wright*, — U.S. — [104 S.Ct. 3315, —] (1984).

The second basis for dismissal is lack of any substantial federal question. Appellants' arguments as to alleged rights under the First and Fourteenth Amendments are wholly specious, and do not merit full consideration by this Court. First Amendment rights cannot possibly be violated by a government agency adopting viewpoints with which various members of the public may disagree. As

the California Court of Appeal so aptly noted, "[i]f the government cannot address controversial topics it cannot govern." *Miller,* 151 Cal.App.3d at 701.

Appellants unquestionably have the right to express their own opinions as to all issues addressed by the Commission, and there is no allegation that the Commission has suppressed the appellants' exercise of this right in any way. Appellants merely allege that the Commission's use of state funds to express views with which appellants disagree but not appellants' own views somehow violates appellants' first amendment rights. This Court disposed of a similar claim last year, stating:

> "We . . . reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Regan v. Taxation With Representation,* — U.S. — [103 S.Ct. 1997, 2001] (1983).

Appellants' contention that the existence of the Commission violates equal protection guarantees against gender discrimination is equally devoid of merit. The California Legislature determined that women in California "still are not able to contribute to society according to their full potential" (Cal.Gov. Code § 8240), and as the California Court of Appeal recognized, the Commission's "purpose is the fulfillment of constitutional principles of equality." *Miller,* 151 Cal.App.3d at 699.

Appellants disagree with the views of the Commission and with the California Legislature's determination that the Commission is necessary, but this disagreement does not support an appeal to this Court. A taxpayer may not use "a federal court as a forum in which to air his generalized grievances about the conduct of govern-

ment. . . ." *United States v. Richardson,* 418 U.S. 166, 173 (1974), quoting *Flast v. Cohen,* 392 U.S. 83, 106 (1968). The appeal should be dismissed for lack of jurisdiction and/or lack of a substantial federal question.

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## ARGUMENT

### I.

### This Court Lacks Jurisdiction to Hear This Appeal Due To Appellants' Lack Of Standing.

As appellants acknowledge, this is a "taxpayer action to enjoin the California Commission on the Status of Women from legislative lobbying" (Jurisdictional Statement, page 1) and a "taxpayer action to abolish the California Commission on the Status of Women" (Jurisdictional Statement, page 2). Such actions by state taxpayers are permitted in California courts, which have held that state taxpayers do have standing to maintain actions against the state and its officers and agencies, to prevent allegedly unlawful actions and unlawful expenditures of state money. *See, e.g., Central Valley Chapter of the 7th Step Foundation, Inc. v. Younger,* 95 Cal.App.3d 212, 232-233 [157 Cal.Rptr. 117] (1979); *Farley v. Cory,* 78 Cal.App.3d 583, 588-589 [144 Cal.Rptr. 923] (1978); and *Serrano v. Priest,* 5 Cal.3d 584, 618 n.38 [96 Cal.Rptr. 601] (1971), *cert. denied* 432 U.S. 907 (1977).

Appellants' standing to attack State action in California courts does not determine the issue of standing in this Court. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 282 (1961); *Princeton University v. Schmid,* 455

U.S. 100, 102 n.* (1982). This Court will decide whether, as a matter of federal law, appellants have standing to pursue this appeal, and if appellants lack standing under applicable federal law, the appeal will be dismissed for lack of jurisdiction. *Doremus v. Board of Education,* 342 U.S. 429, 435 (1952).

The dismissal of the instant appeal is squarely governed by *Doremus v. Board of Education.* In that case as in this, state taxpayers brought an action in state court challenging a state statute on federal constitutional grounds, and the state appellate court held the statute valid against the constitutional claims. *Doremus v. Board of Education,* 5 N.J. 435 [75 A.2d 880] (1950). The taxpayers appealed to this Court, which dismissed the appeal for lack of jurisdiction. The taxpayers' lack of standing meant there was no "case or controversy" as required by Article III, Section 2 of the United States Constitution. As this Court explained:

> "This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure. . . . Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' *Massachusetts v. Mellon, supra*

> [262 U.S. 447] at 488 [1923]." *Doremus,* 342 U.S. at 433-434.

Even though the state court had decided the federal constitutional claims, the Supreme Court dismissed the appeal for lack of jurisdiction. *Id.,* at 435. See also *Cheaney v. State of Indiana,* 285 N.E.2d 265 (1972), *cert. denied for lack of standing,* 410 U.S. 991 (1973).

Since *Doremus,* the concept of standing for state and federal taxpayers[1] has been further refined, and suits have been permitted where these taxpayers show "a personal stake in the outcome of the controversy. . . ." *Flast v. Cohen,* 392 U.S. 83, 99 (1968), quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962). As this Court further explained in *Flast v. Cohen*:

> "A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case." *Id.,* 392 U.S. at 101.[2]

Where, as here, taxpayers merely allege dissatisfaction with government action, the requisite "personal stake" is absent and standing is lacking. In *United States v. Richardson,* 418 U.S. 166 (1974), for example, a federal taxpayer complained about allegedly unconstitutional pro-

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1. Municipal taxpayers, unlike state or federal taxpayers, have long been held to have a "direct and immediate" interest. *Massachusetts v. Mellon,* 262 U.S. 447, 486 (1923).

2. Circumstances which have been found to provide the requisite "personal stake" include taxpayers and voters alleging impairment of voting rights *(Baker v. Carr,* 369 U.S. at 208), and taxpayers and parents of school children alleging establishment clause violations in the schools their children attend *(Zorach v. Clauson,* 343 U.S. 306, 309 n.4 (1952) and *Abingdon School Dist. v. Schempp,* 374 U.S. 203, 224 n.9 (1963)).

visions of the Central Intelligence Agency Act, 50 U.S.C. § 403a *et seq.* Relying upon *Flast v. Cohen,* the Court reaffirmed that a taxpayer "seeking 'to employ a federal court as a forum in which to air his generalized grievances about the conduct of government'" has no standing. *United States v. Richardson,* 418 U.S. at 175. Similarly, *see Schlesinger v. Reservists To Stop The War,* 418 U.S. 208, 227-228 (1979).

More recently, in *Valley Forge Christian College v. Americans United,* 454 U.S. 464 (1982), this Court reviewed a taxpayers' challenge to a system for disposing of surplus federal property. An organization and individual taxpayers dedicated to the separation of church and state sued to challenge a transfer of surplus property to a church-related school. As this Court determined, the plaintiffs therein lacked standing either as taxpayers or citizens. Citing *Doremus* and the other cases discussed above, the Court reaffirmed that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer." *Valley Forge,* 454 U.S. at 477. Furthermore, in rejecting a claim to standing as citizens, this Court stated:

> "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.,* at 485-486.

And most recently, in *Allen v. Wright,* — U.S. — [104 S.Ct. 3315] (1984), this Court denied standing to parents of black children who sought to challenge the policy of the Internal Revenue Service in granting tax-exempt status to discriminatory private schools. As the Court explained, an interest in having the government act lawfully "is not sufficient, standing alone, to confer standing on a federal court." *Id.*, at ——.

In *Allen v. Wright* and in the instant case, no direct, personal injury was alleged. The case was prosecuted not to redress individual injury, but to voice objections to government policies. As recognized in *Allen v. Wright,* a federal court is not the proper forum for general complaints about the government, and standing should not be recognized "in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus" of government. *Id.*, at ——.

The instant appeal should be dismissed for lack of standing because appellants have alleged no personal or direct injury due to the allegedly unconstitutional state statutes which establish the Commission. As taxpayers, they do not have a sufficient personal stake in this case to confer standing in this Court, and appellants have alleged no other basis for pursuing this appeal.

## II.

**This Appeal Raises No Substantial Federal Questions.**

Even if this Court were to reach the merits of appellants' federal questions, the instant appeal does not raise

any issues worthy of this Court's full attention. The federal questions which appellants attempt to raise are not merely insubstantial; they are completely without merit.

### A. No First Amendment Rights Are Abridged By The Commission's Efforts To Promote Gender Equality.

Appellants' First Amendment allegations are more significant for what is not in issue than for what concerns are raised by the instant appeal. The Commission has not denied appellants or anyone else a public forum. Nor has the Commission drowned out appellants' expression of their own point of view. And, finally, the Commission has not interfered with a political controversy submitted to popular vote. *Miller*, 151 Cal.App.3d at 702.

The only First Amendment issue herein is whether the Commission's statutory authority to express its opinion on issues concerning gender equality denies any right to free speech. Appellants contend that it is unconstitutional for the government to promulgate any particular viewpoint on controversial matters of public importance (Jurisdictional Statement, page 16).

Before addressing the relevant law on this issue, which is sparce due to the speciousness of appellants' claim, or distinguishing the cases upon which appellants rely, which are wholly inapposite, it is important to consider the consequences of appellants' position. If appellants were correct, then the government could never address issues on which the public viewpoint is divided. The Department of Defense could not advocate increased military preparedness; the Nuclear Regulatory Commission could not advocate the safety of nuclear power plants; and the Surgeon General could not advocate the dangers

of smoking. As the California Court of Appeal noted, the government must be able to address controversial issues, even if in doing so it advocates viewpoints with which a portion of the citizenry disagrees.

Only a few cases address the validity of government programs to which some taxpayers object. In large part this is because, as discussed above, such claims are not within the jurisdiction of federal courts, unless the taxpayers can show a direct and personal injury. When standing to raise such claims does exist, the claims have been denied.

In *United States v. Lee*, 455 U.S. 252 (1982), an employer sought a refund for social security taxes, claiming he was opposed to such taxes on religious grounds. His claim was rejected. As this Court explained:

> "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.*, at 260.

If objections based upon religious beliefs do not require any change in the tax system, appellants' philosophical objections to the Commission's activities certainly do not merit any affirmative relief.

In *Regan v. Taxation With Representation*, — U.S. — [103 S.Ct. 1997] (1983), an organization advocating tax reform challenged a denial of tax exempt status, arguing that Congress was violating the First and Fourteenth Amendments by subsidizing lobbying efforts by veterans' organizations but not by other nonprofit groups. Both claims were rejected by this Court. Regarding the free speech claim, the Court stated:

> " . . . Congress has not infringed any First Amendment rights or regulated any First Amend-

ment activity. Congress has simply chosen not to pay for TWR's lobbying." *Id.*, at 2001.

Likewise, in the instant case, the fact that the California Legislature has chosen to fund the Commission and its activities promoting gender equality does not mean that any First Amendment rights of groups who espouse other viewpoints are abridged. As the California Court of Appeal recognized:

> "[Appellants'] claim fails to make the critical First Amendment distinction between the '[g]overnment's [a]ddition of its [o]wn [v]oice [and the] [g]overnment's [s]ilencing of [o]thers,' (See Tribe, American Constitutional Law (1978) p.588.)" *Miller*, 151 Cal.App.3d at 700.

See also *Anderson v. City of Boston*, 378 Mass. 178 [380 N.E.2d 628, 637] (1978), appeal dismissed for want of substantial federal question, 439 U.S. 1060 (1979). ("[T]here are a variety of instances in which government funds are used lawfully to express views and conclusions on matters of importance where various taxpayers may disagree with those views and conclusions. The Constitution of the United States . . . does not forbid all government communications and publications which are not neutral and purely informative.")

None of the cases cited by appellants support their contention that First Amendment rights are violated by a government agency's advocacy of a particular viewpoint.[3] Most of appellants' cases concern government

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3. The only governmental advocacy which has been restricted is advocacy in favor of a particular religion, which violates the Establishment Clause. *Feminist Women's Health Center, Inc. v. Philibosian*, — Cal.App.3d — [203 Cal.Rptr. 918, 926-927] (1984). This is obviously not at issue in the instant appeal.

restriction or regulation of the free speech of private individuals,[4] and these cases are inapplicable to the instant case since the Commission has never restricted appellants' expression of their own point of view. The other line of cases cited by appellants concern freedom from compelled speech and association.[5] These are also inapplicable since the Commission has never purported to compel appellants in any way.

Where, as here, the government is merely expressing one particular position, and is neither forcing others to become proponents of this position nor preventing others from expressing contrary positions, there is simply no infringement of First Amendment freedom of speech rights. Appellants are in no way prevented from espousing their own opinions merely because the California Legislature

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4. Cases cited by appellants which concern government efforts to restrict private speech include *Bolger v. Youngs Drug Products Corp.*, — U.S. — [103 S.Ct. 2875] (1983) (government may not prohibit the mailing of contraceptive advertisements); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (government may not forbid display of real estate signs); *Wooley v. Maynard*, 430 U.S. 705 (1977) (government may not force display of state motto on license plate); *Elrod v. Burns*, 427 U.S. 347 (1976) (government may not condition public employment upon political activity); and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (government may not forbid advertisement of drug prices).

5. Cases cited by appellants which concern government-compelled speech or association include *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (public employment cannot be conditioned upon contributions to political causes); *Buckley v. Valeo*, 424 U.S. 1 (1976) (government may not limit campaign expenditures); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (school may not expel students for refusing to salute flag.).

has created the Commission as an advocate for gender equality.

### B. The Commission's Efforts To Promote Gender Equality Do Not Violate Equal Protection Guarantees.

Appellants' Fourteenth Amendment equal protection claim consists of two premises, both of which are erroneous. Appellants argue, first, that the establishment of the Commission constitutes a gender preference, and, second, that this preference is not justified. Appellants are wrong on both counts.

As determined by the California Court of Appeal, the Commission "is not a preference of women over men . . . " *Miller,* 151 Cal.App.3d at 699. Its purpose is to promote gender equality, and it could just as well have been given a more gender-neutral title. *Id.,* at 699 n.8. Appellants cite no authority to support their claim that the Commission constitutes a gender preference, and the fact that the Commission's title mentions women but not men scarcely inverts a program to promote gender equality into a gender preference.[6]

Even if the California Court of Appeal had interpreted the Commission's statutory authority as establishing a gender preference, not every such preference violates equal protection guarantees. The government may establish a program to eliminate traditional discrim-

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6. The federal government, like California, has established programs to promote gender equality which have sex-specific titles but do not constitute gender preference, including the Women's Bureau in the Department of Labor, 29 U.S.C. § 11, and National Advisory Council on Women's Education Program, 20 U.S.C. § 3346.

ination against women without offending the Fourteenth Amendment.

The federal constitutional standard for legitimate gender classification requires that the classification serve important governmental objectives and be substantially related to achieving those objectives. *Heckler v. Mathews,* — U.S. — [104 S.Ct. 1387, 1397-1398] (1984); *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724-725 (1982); *Caban v. Mohammed,* 441 U.S. 380, 388 (1979); and *Craig v. Boren,* 429 U.S. 190, 197 (1976). And while gender classifications are not measured by the stricter compelling state interest test which applies to race classifications, even the latter test is satisfied where the legislature determines that a remedial program is required to eliminate traditional inequality. As stated in *Fullilove v. Klutznick,* 448 U.S. 448, 490 (1980), where this Court approved a public works program giving preference to minority contractors:

> "Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; . . . "

The California Legislature determined that past societal discrimination against women justified the creation of the Commission. As stated in California Government Code section 8240.

> "The Legislature finds and declares that despite the fact that women apparently have greater equality in California than in many states, they still are not able to contribute to society according to their full potential. With a view to developing recommenda-

> tions which will enable women to make the maximum contribution to society, the Legislature has created the Commission on the Status of Women."

Appellants attempt to dismiss this legislative determination as "statutory recital" similar to that rejected in *Mississippi Univ. for Women v. Hogan,* 458 U.S. at 725 n.10 and 726. In the latter case, however, the statute perpetuated traditional, stereotypic assumptions about women. In the instant case, the California Legislature had "evidence of a long history of marked disparity" as in *Fullilove v. Klutznick,* 448 U.S. at 478, and acted to eliminate this traditional discrimination.

The California Legislature has determined that widespread gender inequality exists throughout California, and it created the Commission to address this concern. The statute establishing the Commission fulfills rather than offends the constitutional guarantee of equal protection.

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## CONCLUSION

For the reasons stated above, the appeal should be dismissed for lack of jurisdiction and/or want of a substantial federal question. Alternatively, the judgment of the California Court of Appeal should be summarily affirmed.

Dated: August 16, 1984.

Respectfully submitted,

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